

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1932

No. 5877

322

AUGUST H. MORAN, PLAINTIFF IN ERROR,

vs.

**WASHINGTON RAILWAY AND ELECTRIC
COMPANY.**

**IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.**

FILED DECEMBER 19, 1932.

PRINTED JANUARY 19, 1933.

Court of Appeals of the District of Columbia

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vs.

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COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
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Court of Appeals of the District of Columbia

No. 5877.

AUGUST H. MORAN, Plaintiff in Error,

vs.

WASHINGTON RAILWAY AND ELECTRIC COMPANY.

1 Municipal Court of the District of Columbia.

No. A 6014.

AUGUST H. MORAN, Plaintiff,

vs.

WASHINGTON RAILWAY AND ELECTRIC COMPANY,
a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

2 *Order of Court Granting Plaintiff's Oral Motion in Open Court to Take a Voluntary Non-suit.*

August 19, 1931.

Minutes 60, p. 38.

Come now the parties hereto and after this cause is called for trial the plaintiff submits to a voluntary non-suit. Wherefore, it is considered that the plaintiff take nothing by this action, that the defendant go hence without day be

for nothing held and recover of the plaintiff his costs of defense.

Certificate Filed by the Defendant Showing the Costs of the Attendance of His Witnesses, the Traveling Mileage Costs of His Witnesses, as Paid by Him for Attendance Upon the Court at the Trial Held on May 28, 1932.

Filed September 17, 1932.

I, H. W. Kelly, Attorney of Record in above-entitled cause, do hereby certify that the following named persons attended Court as witnesses on behalf of plaintiff, defendant, the number of days set opposite their names, to wit:

William A. Heiss, 1; Thomas W. Blythe, 1; W. H. King, 1; James Harker, 1; Le Roy Martin, 1; B. C. Woodville, 1.

Albert Coburn, 1; (Mileage to and from Louisville, Ky., 659 miles each way) 1,318 miles at .05¢, \$65.90.

(Signed)

H. W. KELLY,
Attorney for Wash. Ry. & El. Co.

September 16th, 1932.

3 *Docket Entry of Costs Taxed Against Plaintiff.*

April	2, 1929.	Declaration and Bill of Particulars filed	1.00
April	2, 1929.	Summons and copy issued returnable April 16.....	1.25
April	2, 1929.	Docketing and indexing	2.00
April	4,	Summons returned signed A. M. Fisher, Tr.....	.25
April	15,	Demand for Jury Trial filed by pltf.....	.25
April	22,	Additional bill of particulars filed by pltf.....	.25
April	23,	Plea filed	.25
April	22,	Joinder of issue filed by plaintiff	.25
May	27,	Subpœnas and copies issued (8)	4.80
May	28,	Trial verdict for plaintiff for \$500	13.00
May	29,	Certificate of witness attendance filed by plaintiff (\$14.00).....	.25
August	20,	Transcript of record issued to pltf.....	6.80

WASHINGTON RAILWAY AND ELECTRIC COMPANY.			3
June	9,	Short copy issued.....	.50
June	17,	Judgment for costs entered "Satisfied" per plaintiff's order...	.25
June	23,	Costs of the Court of Appeals (\$48.85) upon reversal of the said cause entered "Satisfied" per plaintiff's order filed.....	.25
August	19, '31.	Before trial—Plaintiff submits to a voluntary non-suit. Deft. to recover of plaintiff his costs of defense.	
September	17, '32.	Certificate of witnesses filed by Deft. (7 days \$14.00—Mileage \$65.90)	.25
September	28, '32.	Rule to show cause filed (copy served)	.25
September	28,	Application for rule to show cause why the costs taxed should not be reviewed, filed by pltf.....	.25
October	18,	Pltf's rule to show cause why Blanche Neff, Clerk of Municipal Court, to review costs of Albert Coburn and retax if found to be without authority of law discharged. Pltf. notes an exception. M. 66, p. 455...	.50
4			
October	20,	Motion to deposit cash bond in lieu of supersedeas bond filed by pltf. Set for Oct. 24, 1932, 10 A. M.....	.25
October	24,	Upon motion of Pltf. ordered that Pltf. deposit in this Court the sum of \$89.05 in lieu of a supersedeas bond to protect taxable court costs of Deft. M. 66, p. 477 (Order filed).....	.50
November	23,	Designation of record filed by plaintiff.....	.25
November	23,	Assignment of errors filed by plaintiff.....	.25

October 18,	Affidavit of defendant in support of taxation of costs filed.....	.25
December 6,	Motion for extension of time to file transcript of record filed by pltf. (Order filed).....	.25
December 6,	Upon motion of Pltf., ordered that Pltf. be allowed an extension of time to and including December 20, 1932, to file transcript of record from this Court in the Court of Appeals of the D. of C., and it is further ordered that said motion and order of this court be included in said transcript. M. 69, p. 96	.50

A Copy of the Certified Judgment for Costs Against the Plaintiff Issued by the Clerk of the Municipal Court to the Defendant.

September 12, 1932.

August 19, 1931.	Plaintiff submits to a voluntary non-suit before trial. Defendant to recover costs of defense.	
	Costs of suit (Defendant's costs)	8.40
	Subsequent costs to Satisfy.....	.25
	Cost of Copy	.50
Sept. 17, 1932.	Certificate of witnesses filed.....	79.90
Total		\$.....

Witness the Honorable Judges of said court this
September 12, 1932, *day of A. D. 192-*.

(Signed)

BLANCHE NEFF,

[SEAL.]

Clerk,

(Signed)

By W. M. NEDROW,

Assistant Clerk.

Plaintiff's Application to the Court for a Rule to Issue Against the Clerk of the Municipal Court to Show Cause Why the Costs Taxed Against Him Should not be Reviewed and Retaxed by Her.

Filed September 28, 1932.

Now comes, August H. Moran, plaintiff in the above-entitled cause of action against the defendant railway company, and —:

That on, to wit, the 19 day of August, 1931, he took a voluntary non-suit; that on the 12th day of September, 1932, the Clerk of this Court taxed the legal costs against the plaintiff and issued to the defendant a "short copy" of judgment for costs; that later on the 17th day of September, 1932, the defendant railway company by its counsel certified to this Court that one of its witnesses, Albert Coburn, attended the trial of said action on the 28th day of May, 1929, and was entitled to 5 cents a mile for 1,318 miles in coming to Court and returning to his home in Louisville, Kentucky, a sum amounting to \$65.90; that thereupon the Clerk of this Court erroneously and without authority of law taxed said amount against plaintiff.

Plaintiff applies to this Court for a rule to issue against the Clerk of this Court to show cause why she should not review the taxation of costs assessed against the plaintiff in the sum of \$65.90 covering the mileage of defendant's witness.

(Signed) CLAUDE A. THOMPSON,
CLAUDE A. THOMPSON,
Attorney for Plaintiff,
353 Munsey Building.

6 *The Rule to Show Cause Issued by the Court Against Blanche Neff, Clerk of the Municipal Court, Why She Should Not Review the Taxation of Mileage Costs of Defendant's Witness, Albert Coburn, and Retax the Same.*

Filed September 28, 1932.

Upon consideration of the application of August H. Moran, plaintiff in the above-entitled cause of action against the Washington Railway and Electric Company, a corpora-

tion, defendant, it is by the Court this 28 day of September, 1932,

Ordered, That Blanche Neff, Clerk of the Municipal Court of the District of Columbia, show cause on the 11th day of October, 1932, why she should not review the taxation of mileage costs of witness Albert Coburn appearing as a witness in the above-entitled cause of action, and retax the costs if the taxation of mileage costs of defendant's witness, Albert Coburn, is found to be taxed without authority of law.

(Signed)

JAMES A. COBB,
Judge.

Served copies of this notice on 1. Blanche Neff, 9-28-32; 2. Wm. T. Clark, Asst. Secty. of Wash. Railway & Elec. Co., 9-29-32; E. C. Snyder, U. S. Marshal; T. Gannon, Deputy; Bears, 5.

The Minute Entry of the Court's Order Discharging the Rule to Show Cause Why the Clerk of the Municiple Court Should Not Review the Taxation of Mileage Costs of Defendant's Witness, Albert Coburn, and Retax the Same.

October 18, 1932.

Minutes 66, Page 455.

Upon consideration of the plaintiff's rule to show cause why Blanche Neff, Clerk of the Municipal Court of the District of Columbia, should not review the taxation
7 of mileage costs of witness Albert Coburn appearing as a witness in the above entitled cause, and retax the costs if the taxation of mileage costs of defendant's witness, Albert Coburn, is found to be taxed without authority of law, it is ordered that said rule to show cause be, and the same is hereby discharged, whereupon the plaintiff notes an exception.

Assignment of Errors.

Filed November 23, 1932.

The plaintiff, August H. Moran, alleges that the Municipal Court erred:

1. The trial court erred in discharging the rule to show cause why the clerk of the Municipal Court should not re-

view the taxation of mileage costs of defendant's witness, Albert Coburn, and retax the costs.

2. The trial court erred in not sustaining the rule to show cause why the clerk of the Municipal Court should not review the taxation of mileage costs of defendant's witness, Albert Coburn, and retax the costs, and in allowing the mileage costs of defendant's said witness to be taxed against the plaintiff.

(Signed)

CLAUDE A. THOMPSON,

Attorney for Plaintiff.

Service of copy of the foregoing notice of assignment of errors accepted this 23rd day of November, 1932.

(Signed)

H. W. KELLY,

Attorney for Defendant.

Service of copy of the foregoing assignment of errors accepted this 23rd day of November, 1932.

(Signed)

BLANCHE NEFF,

Clerk of the Municipal Court

of the District of Columbia,

(Signed)

By E. WALDECKER,

Asst. Clerk.

8 *Motion for Extension of Time to File Transcript of Record.*

Filed December 6, 1932.

The plaintiff, August H. Moran, moves the Court on this 6th day of December, 1932, to grant him an extension of time to file with the Clerk of the Court of Appeals of the District of Columbia a transcript of the record in the above-entitled cause, as allows- by a Writ of Error issued out of said appellate court, Original No. 2024, on the 19th day of November, 1932, for the reason that the Clerk of this Court informs plaintiff said transcript of record can not be prepared by her within the twenty (20) day statutory period for filing such record in the appellate court by reason of the fact that other pressing work prevents her from preparing said transcript of record in due time.

(Signed)

CLAUDE A. THOMPSON,

Attorney for Plaintiff.

9 *Designation of Record.*

Filed November 23, 1932.

Now comes August H. Moran, Plaintiff in Error, in the above-entitled cause of action, and designates the parts of the record which he desires to have included in the transcript of record, said parts being sufficient for the determination of the questions raised on appeal, namely:

1. The minute entry of the order of the Court granting the plaintiff's oral motion in open Court to take a voluntary non-suit.

2. The certificate filed by the defendant showing the costs of the attendance of his witnesses, the traveling mileage costs of his witnesses, as paid by him for attendance upon the court at the trial held on May 28, 1932.

3. The docket entry of costs taxed against plaintiff.

4. A copy of the certified judgment for costs against the plaintiff issued by the Clerk of the Municipal Court to the defendant.

5. Plaintiff's application to the Court for a rule to issue against the Clerk of the Municipal Court to show cause why the costs taxed against him should not be reviewed and re-taxed by her.

6. The rule to show cause issued by the Court against Blanche Neff, Clerk of the Municipal Court, why she should not review the taxation of mileage costs of defendant's witness, Albert Coburn, and retax the same.

7. The minute entry of the Court's order discharging the rule to show cause why the Clerk of the Municipal Court should not review the taxation of mileage costs of defendant's witness, Albert Coburn, and retax the same.

8. The assignment of errors.

9. This designation of record.

(Signed)

CLAUDE A. THOMPSON,

Attorney for Plaintiff.

Service of copy of the foregoing notice of designation of record accepted this 23rd day of November, 1932.

(Signed)

H. W. KELLY,

Attorney for Defendant.

Service of copy of the foregoing notice of designation of record accepted this 23rd day of November, 1932.

(Signed)

BLANCHE NEFF,

Clerk of the Municipal Court

of the District of Columbia,

(Signed)

By E. WALDECKER,

Asst. Clerk.

10 *Order Allowing Extension of Time for Filing Record.*

Filed December 6, 1932.

Upon consideration of the above motion, it is by the Court, this 6th day of December, 1932, ordered that the plaintiff be allowed an extension of time to and including December 20th, 1932, to file the transcript of record from this Court in the Court of Appeals of the District of Columbia for the reasons set forth in said motion filed in the above entitled cause.

And it is further ordered by the Court that the said motion and the order of this Court be included in the said transcript of record.

(Signed)

JAMES A. COBB,

Judge.

11 [Stamp:] Filed Nov. 19, 1932, Municipal Court,
District of Columbia.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable James A. Cobb, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between August H. Moran, plaintiff, and Washington Railway and Electric Company, a Corporation, defendant, A-6014, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings

aforesaid, with all things concerning the same to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 19th day of November, in the year of our Lord one thousand nine hundred and thirty-two.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
*Clerk of the Court of Appeals
of the District of Columbia.*

Allowed by
D. LAWRENCE GRONER,
*Associate Justice of the Court of
Appeals of the District of Columbia.*

[Endorsed:] Filed Nov. 19, 1932, Municipal Court, District of Columbia.

12 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 12, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, at Law, No. A 6014, wherein Walter H. Moran, is plaintiff, and Washington Railway and Electric Company, a corporation, is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of December, 1932.

[Seal Municipal Court, District of Columbia.]

BLANCHE NEFF,
Clerk.

Endorsed on cover: In error to the Municipal Court. No. 5877. August H. Moran, plaintiff in error, vs. Washington Railway and Electric Company. Court of Appeals, District of Columbia. Filed Dec. 19, 1932. Henry W. Hodges, Clerk.

(2813)

FOR MR. JUSTICE VAN DUSEN

FEB 9 - 1933

August H. Moran

CLERK

IN THE

Court of Appeals, District of Columbia

OCTOBER TERM, 1932.

No. 5877

AUGUST H. MORAN, *Plaintiff in Error,*

VS.

WASHINGTON RAILWAY AND ELECTRIC COMPANY,
a Corporation, *Defendant in Error.*

In Error to the Municipal Court of the
District of Columbia.

No. A-6014.

BRIEF FOR PLAINTIFF IN ERROR.

CLAUDE A. THOMPSON,
Attorney for Plaintiff in Error.

Washington, D. C.
February 3, 1933.

IN THE
Court of Appeals, District of Columbia

OCTOBER TERM, 1932.

No. 5877

AUGUST H. MORAN, *Plaintiff in Error*,
vs.
WASHINGTON RAILWAY AND ELECTRIC COMPANY,
a Corporation, *Defendant in Error*.

In Error to the Municipal Court of the
District of Columbia.
No. A-6014.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

This case was once before this court on the question as to the jurisdiction of the Municipal Court to enter judgment for defendant upon sustaining a motion for judgment *non obstante veredicto* filed by defendant. It was reversed and remanded for a new trial. Case No. 5036, 60 App. D. C. 155.

Plaintiff in Error, hereinafter called plaintiff, thereafter took a voluntary *non suit*. R. p. 4.

This case again comes here on the question of the jurisdiction of the Municipal Court to tax mileage costs of defendant's witness in coming from Louisville, Ky., and returning to his home, amounting to \$65.90, as certified by counsel for defendant (R. p. 2), and as shown on docket entry. R. p. 3.

A rule was issued against the clerk of the Court to show cause why she should not review the taxation of the mileage costs of defendant's witness, Albert Coburn, and retax same if found to be taxed without authority of law. R. pp. 5 and 6.

Upon a hearing the rule to show cause was discharged, and plaintiff noted an exception. R. p. 6.

II.

ASSIGNMENT OF ERRORS.

1. The trial Court erred in discharging the rule to show cause why the Clerk * * * should not review the taxation of mileage costs of defendant's witness, Albert Coburn, and retax the same.
2. The trial Court erred in not sustaining the rule to show cause why the Clerk * * * should not review the taxation of mileage costs of defendant's witness, Albert Coburn, and retax the costs, and in allowing the mileage costs of defendant's said witness to be taxed against plaintiff.

III.

ARGUMENT.

It is respectfully submitted that the Municipal Court is without jurisdiction to tax mileage costs of witnesses in coming to court and returning to their homes outside of the District of Columbia.

At common law no costs were awarded to either party. This was considered a hardship and the Statute of Gloucester, 6 Edward I, c 1, was passed, which gave costs in all cases where the plaintiff recovered damages.

There is no statutory authority allowing a witness in the Municipal Court travelling mileage costs.

Congress in creating the Municipal Court, February 17, 1909, 35 Stat. part 1, page 623, provided:

“The said court and each member thereof *shall* exercise the same jurisdiction as was vested in them as justice of the peace *immediately before* this Act, *and no more*, and *shall* be governed by the laws then in force, except as said laws and said jurisdiction are expressly changed or enlarged hereby.”

In creating the office of justice of the peace Congress did not grant the justices of the peace power to allow witnesses mileage costs. *U. S. Rev. Stat. Sec. 863*. Congress did provide, however, for the taking of testimony of a non-resident witness in cases before the justices of the peace on written interrogatories and cross-interrogatories. *D. C. Code (1924) Sec. 25*. The same provision was made for the taking of testimony of non-resident witnesses in cases before the Municipal Court. *D. C. Code (1929) Title 18, Sec. 231*.

Congress deemed it expedient to give the Supreme Court of the District of Columbia jurisdiction to tax mileage costs of witnesses in coming from and returning to their place of abode, but gave no such jurisdiction to the Municipal Court. *D. C. Code. (1929) Title 10, Sec. 18; 44 Stat. 324, c. 183. enacted April 26, 1926*. This section repealed *Sec. 1114, D. C. Code (1924)*; *Rev. Stat. D. C., Sec. 880, Act of February 28, 1799, (1 Stat. p. 626)*, which Act gave the Supreme Court jurisdiction to allow mileage costs of witnesses in coming to court

and returning to their place of abode, when *summoned* from without the District of Columbia.

Henkel vs. Chicago, St. Paul, Minneapolis & Omaha Railway Company, 284 U. S. 444, 446; 76 L. Ed. 386, 388.

Where there is statutory authority for allowing witnesses mileage costs the overwhelming weight of authority is that such costs are taxable only for the distance a witness can be reached by subpoena.

Kirby vs. U. S., 273 Fed. 391, 396; Affirmed by Supreme Court in 260 U. S. 423, 67 L. Ed. 329. *Deal vs. U. S.*, 274 U. S. 277, 284, reversing Ninth Circuit Court of Appeals, 11 Fed. (2) 3, 8-9.

The justices of the peace only had power to compel the attendance of witnesses within the District of Columbia. D. C. Code (1924) Sec. 25; 31 Stat. 1193, C 854, Sec. 25. The Municipal Court was only given a like power to summon witnesses by a reenactment of the foregoing statute, which reads as follows:

“The Municipal Court shall have power to compel the attendance of witnesses from any part of the District of Columbia * * *.”

D. C. Code (1929) Title 18, Sec. 230.

It is respectfully submitted that the Municipal Court has no jurisdiction to tax mileage costs of witnesses, and that the Court erred in discharging the rule and in taxing witness Coburn's mileage costs against plaintiff; and that the judgment of the Municipal Court should be reversed and said Court ordered to eliminate Coburn's mileage costs from the taxable costs against plaintiff by reason of taking a voluntary *non suit*.

CLAUDE A. THOMPSON,
Attorney for Plaintiff in Error.

Washington, D. C.
February 3, 1933.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

MAR 3 - 1933

Thurley H. Hodges
CLERK

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1932.

—
No. 5877
—

AUGUST H. MORAN, PLAINTIFF IN ERROR,

vs.

WASHINGTON RAILWAY & ELECTRIC COM-
PANY, A CORPORATION, DEFENDANT IN
ERROR.

—
IN ERROR TO THE MUNICIPAL COURT OF THE
DISTRICT OF COLUMBIA.

—
BRIEF OF APPELLEE.
—

H. W. KELLY,
Attorney for
Washington Railway & Electric Company.

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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1932.

No. 5877

AUGUST H. MORAN, PLAINTIFF IN ERROR,

vs.

WASHINGTON RAILWAY & ELECTRIC COMPANY, A CORPORATION, DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF APPFLEE.

PRELIMINARY

In this brief for convenience, the parties to this appeal will be referred to as plaintiff and defendant, this being in accord with their alignment in the Court below.

STATEMENT

The plaintiff sued the defendant in the Municipal Court for damages to his automobile and for personal injuries, claiming damages from the defendant in the sum of One Thousand Dollars (\$1,000.00). In the trial of the case before a jury, Coburn, a witness, who lived in Kentucky, appeared and testified. The jury's

verdict was set aside by the Court on a motion for judgment non obstante. This court reversed the lower Court and remanded the case for a new trial in Case No. 5036, 60 App. D. C. 155. Plaintiff took a voluntary non-suit.

The defendant thereupon asked for judgment for its costs in the Municipal Court, which was granted. The plaintiff excepted to the Court allowing as a part of the judgment the item of \$65.90 arrived at by allowing five cents a mile for the witness from Louisville, Kentucky, to the Court and return. No exception was raised to this item of cost, except on the ground that no statutory authority existed for the taxing of mileage as a part of cost for the appearance of the non-resident witness in attendance in the Municipal Court.

ARGUMENT

Point 1

SECTION 1114 OF CHAPTER 854, 31 STATS. 1367 IS THE STATUTORY AUTHORITY

Taxing cost is of purely statutory origin. *Washington & Georgetown Railroad Company vs. American Car Company*, 5 App. D. C. 524; *United States vs. Sanborn*, 28 Fed. 299; *Ruth J. Henkel et al., vs. Chicago, St. Paul, Minneapolis and Omaha Railway Co.*, 284 U. S. 444, 76 L. Ed. 386.

Where there is statutory authority the mandates of the statute are controlling. *Ruth J. Henkel et al., vs. Chicago, St. Paul, Minneapolis and Omaha Railway Co.*, supra.

The Act of Congress approved March 3, 1901, entitled "An Act to establish a Code of Law for the District of

Columbia," known as Chapter 854, 31 Stats. 1189, Section 1114, provides as follows:

"Witness Fees.—For each day's attendance in Court or before any officer pursuant to law, one dollar and twenty-five cents; and when a witness is subpoenaed in more than one cause between the same parties at the same term only one per diem compensation shall be allowed for attendance; and for traveling, at the rate of five cents per mile, coming and returning to and from the witness's place of abode, when summoned from without the District to testify in the courts of the District.

"No officer of the United States courts shall be entitled to witness fees for attending before a court or commissioner where he is officiating."

This Section is known as Section 1114 of the "Code of Law of the District of Columbia, amended to June 7, 1924." It is respectfully urged that the said section is definite and certain, and lacks ambiguity. The section can be said to be a local Act of Congress, it having in mind the necessities of the locality in which the Act is to be operated, and contemplated that witnesses would be "coming and returning to and from the witness's place of abode, when summoned from without the District to testify in the courts of the District." Courts other than the Supreme Court were contemplated, otherwise the words *Courts of the District* would not have been used. In practice before Courts of the District, the statute has been relied upon since it became operative up to the passage of the Act of April 26, 1926, 44 Stats. 323, except as to the Police Court, Title 18, Section 164, governing as to this Court.

Congress had in mind traveling costs at the rate of five cents per mile for non-resident witnesses, and it did not say nor limit the number of miles, as plaintiff contends. Congress had knowledge of the Court of Appeals ruling in the case of *Washington and Georgetown*

Railroad Company vs. American Car Company, supra, decided March 5, 1895, when it passed the Act in 1901. If Congress had not been satisfied with the interpretation placed by this Court upon the Act of February 28, 1799, 1 Stats. 626, it would have limited the travel in the said section to one hundred miles. It evidently realized the injustice that might be done to either witnesses or litigants who may be called upon to defend unmeritorious litigation, in the event such litigant was handicapped in securing the necessary witnesses, because of the expense prohibiting him from doing so.

Counsel for plaintiff in his brief seems to infer that the sole means of obtaining testimony from non-resident witnesses, is by deposition. This court in the *Washington and Georgetown Railroad Company vs. American Car Company*, supra, following the case of *United States vs. Sanborn*, supra, decided this question and had this to say on that subject:

“The objection that mileage cannot be allowed because the witnesses in this case resided at a greater distance than one hundred miles from the place of trial and that their depositions should have been taken as authorized by Section 863 of the Revised Statutes, was also decided by Mr. Justice Gray in the case of *United States vs. Sanborn*, supra, following the construction given a statute by Mr. Justice Story, holding that it was optional with the party to take the deposition or procure the personal attendance of the witness, and that in many cases the presence of the witness before the Court and jury was so important to a fair trial of the issue that it would be a hardship upon the party to deny the right of mileage where the presence of the witness seemed material or proper. Undoubtedly, as shown by the opinions last above referred to, the court has a discretion in this particular, and ought and

would not permit a party to unnecessarily swell the costs by bringing from a distance witnesses whose testimony could as well be presented by deposition."

It is pointed out that counsel finds no objection to the lower Court's discretion on this point, but only denies that the Court could lawfully award the five cents per mile for traveling expenses, because he says the Act of Congress of April 26, 1926, 44 Stats. 324, Chapter 183, known as Title 10, Sec. 18 of the 1929 Code for the D. C. repeals the above said section.

Point 2

D. C. CODE, 1929, TITLE 10, SECTION 18, 44 STATS. 324, CHAPTER 183, ACT OF APRIL 26, 1926, DOES NOT REPEAL SECTION 1114 OF THE ACT APPROVED MARCH 3, 1901, 31 STATS. 1367.

It is respectfully urged that said Section 1114 is a local Act of Congress for the District of Columbia, and that Section 18, of Title 10 of the D. C. Code for 1929 is an Act of Congress applying to the United States Courts, including the District Court of Hawaii, the District Court of Porto Rico and the Supreme Court of the District of Columbia. The title of the Act of 1901 is "An Act to Establish a Code of Law for the District of Columbia." The title of the Act of April 26, 1926, is "An Act fixing the fees of jurors and witnesses in the United States Courts, including the District Court of Hawaii, the District Court of Porto Rico, and the

Supreme Court of the District of Columbia.” Section 5 of said Act provides:

“All laws or parts of laws in so far as they are in conflict with the provisions of this Act are hereby repealed. This Act to be effective thirty days after its approval.”

In the case of *Washington Railway and Electric Company vs. District of Columbia*, 56 App. D. C. 134, 54 Wash. Law Reporter, 213, this Court in passing upon the question as to whether or not two later and more general Acts of Congress repealed an earlier Act on a particular subject, on page 135, said:

“It is not claimed that the latter expressly repealed the former, but that it impliedly served as a repeal or substitute for it”

On page 136:

“It is a well-established rule that repeals by implication are not favored, and that a general statute, without negative words, will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent. *United States vs. Sampson*, 19 App. D. C. 419; *Wood vs. United States*, 16 Pet. 342, 10 L. Ed. 987; *Henderson’s Tobacco*, 11 Wall (78 U. S.) 652, 657, 20 L. Ed. 235; *Wilmot vs. Mudge*, 103 U. S. 217, 26 L. Ed. 536; *Frost vs. Wenie*, 15 S. Ct. 532, 157 U. S. 46, 39 L. Ed. 614. We conclude accordingly that the earlier Act was not repealed by the Act of May 23, 1908.

“We are also of the opinion, for the same reason, that it was not repealed by the Act of March 4, 1913. The latter Act (paragraph 96 of Section 8), conferred upon the Public Utilities Commission the authority theretofore possessed by the Interstate Commerce Commission over the street railroad companies of the District. This authority was at the same time enlarged and made more definite. But in paragraph 101 of the Act

it was provided that all statutes and regulations then in force, except as modified or changed by the Act, or until modified or changed under its provisions, should remain in full force and effect, until altered, amended, or repealed according to law, and that all statutes and regulations inconsistent and repugnant to the provisions of the Act were repealed, but only so far as inconsistent and repugnant thereto.

"The Act of March 3, 1905, was in full force at the time of the enactment of this Act, and was not inconsistent with or repugnant to it. Nor does it appear from the record that the Public Utilities Commission has at any time undertaken to abrogate it. A suggestion appears in the record that the Commission 'acquiesced' in a partial departure by the company from its requirements. This, however, even if true, was not intended as a modification of the statute, for the record discloses that the Commission repeatedly referred to it as still in effect."

There is one provision in each of the Acts passed since the Act of February 28, 1799, 1 Stats. 626 up to and including the Act of April 26, 1926, 44 Stats. 323, that has always been the same or similar, and that is the provision providing for traveling at the rate of five cents per mile coming and returning to and from the witness's place of abode. This provision is not inconsistent with the provision for traveling expenses in the Act of April 26, 1926. This Court having construed this provision as applicable to the District of Columbia in the *Car Case*, supra, to mean what the provision says, namely, "For traveling, at the rate of five cents per mile, coming and returning to and from the witness's place of abode," and allowed five cents per mile for four witnesses from St. Louis, Missouri, to the District, rather than allowing a witness for only a part of the distance, this ruling

should be followed unless it can be shown that the Court committed error or made an unwise decision.

Counsel for plaintiff seems to contend that the Act of February 17, 1909, 35 Stats., Part 1, Page 623, is the last legislation affecting the Municipal Court and its status. He overlooks the Act of March 3, 1921, 41 Stats., Part 1, Page 1310. By this Act the Municipal Court was given exclusive jurisdiction in which the claimed value, or damages claimed, did not exceed \$1,000.00, rather than concurrent jurisdiction with the Supreme Court. Section 2 provided that the Municipal Court should be a court of record and have a seal and its terms should be the same as those of the Supreme Court. Section 3 provided for jury trial. Section 4 provided for the manner in which jurors should be drawn and what their pay should be, and required that the compensation should be the same as jurors drawn for the Supreme Court as fully as if such laws referred to said Municipal Court; abolished appeals to the Supreme Court and provided for writs of error to the Court of Appeals direct from the Municipal Court. Section 5 provided that the finding of a judge without a jury should have the same effect as the verdict of a jury. The Act contained provisions making various sections of the Code which applied only to the Supreme Court apply also to the Municipal Court. Section 11 gave the Court power to prescribe fees and costs, to make rules of practice, pleading and procedure, and to modify and change the same from time to time, with the exception of Section 1109 of the Code of Law for the District of Columbia relating to counsel fees. Section 15 provided "That all Acts and parts of Acts inconsistent herewith are hereby repealed," and it is, therefore, contended that the Act of February 17, 1909, has no application. When the Act of 1921 enlarging the jurisdiction of the Municipal Court was passed, the Act of March 3, 1901, known as Section

1114 of the Code, was the only Act in the District relating to witness fees, and thereafter the Municipal Court has proceeded to fix witness fees. The Act of 1921 shows a clear legislative intent to clothe the Municipal Court with the power to prescribe witness fees.

If it were not for the fact that the Act of April 26, 1926, specifically applies to the United States courts, including the Supreme Court of the District of Columbia, thereby specifically naming the Supreme Court but not mentioning any other courts of the District of Columbia, it could be contended that this Act applies to the Municipal Court as well as to the Supreme Court in view of this Court's holding in the case of *Moran vs. Washington Railway & Electric Company*, 60 App. D. C., 155, in which case it was held that the Municipal Court was a Federal Court, and because thereof the Seventh Amendment to the Constitution applied to the Municipal Court.

Whether the Act of 1901 or the Act of 1926 is in force and applies to the Municipal Court is immaterial for the purpose of this case, because both Acts contain provision for mileage at 5c per mile, the only difference between the two Acts in effect being that the Act of 1926 increases witnesses' compensation for attendance. The fact that the Act of 1926 specifically mentions the Supreme Court indicates that the Act of 1926 was not intended by Congress to be a substitute for the Act of 1901. The provisions of the Act of 1926 are not repugnant to the provisions of the Act of 1901 and the most that can be said is that the Act of 1926 specifically applies to the Supreme Court of the District of Columbia and is a modification of the Act of 1901, there being a necessity for the existence of both. This position is in accord with *Mooers Annotations to District of Columbia Code*, p. 83, as follows:

“This section ,(1114 of the act of March 3, 1901, 31 Stats. 1367, c. 854) appears to be in force

except in so far as it has been modified by and is inconsistent with sections 16-20 of this title. It appears to be in force as far as the municipal and juvenile courts are concerned." (Language in brackets ours.)

Point 3

CONSTRUCTION BY FEDERAL COURTS OF THE PROVISION FOR TRAVELING AT FIVE CENTS PER MILE.

Plaintiff contends that where there is statutory authority for allowing witnesses mileage costs, the overwhelming weight of authority is that such costs are taxable only for the distance the witnesses can be reached by subpoena. In the case of *Washington and Georgetown Railroad Company vs. American Car Co.*, supra, this same question was raised, and this Court took the contrary view. On page 528, 5 App. D. C. the Court said:

"Upon the first question, whether it is necessary that a witness shall be summoned in order to entitle him to mileage, the authorities are somewhat in conflict, but in the recent case of *United States vs. Sanborn*, 28 Fed. Rep. 299, Mr. Justice Gray reviewed all the more important cases and held that the better opinion is, that where a witness attends at the request of a party for whom he testifies, and travels from his place of residence to the place of trial for the sole purpose of testifying, he is entitled to mileage the same as if he had attended in obedience to a subpoena or summons regularly served. That opinion is a construction of Section 848 of the Revised Statutes, but the language of that section in all particulars material to the question of mileage is substantially the same as the sixth section of the Act of February, 1799. The learned justice allowed mileage in

that case although the witness lived at a greater distance from the place of trial than one hundred miles and was not summoned. While that case is not binding upon this court, the reasons for the ruling seem so cogent that it ought to be followed."

This Court followed the rule in the case of *United States vs. Sanborn*, supra. In that case a claim was made for the expenses of government witnesses amounting to \$212.20 arising under a different section of the revised Code, in addition to the question of mileage. Mr. Justice Gray allowed mileage from the witnesses' homes to the place of trial, but denied the Government's claim for the expenses of its employees. The case went to the Supreme Court of the United States, being known as *United States vs. Sanborn*, 135 U. S. 271, 34 L. Ed. 112. The Supreme Court approved Mr. Justice Gray's holding in allowing mileage for the witness for 416 miles from his residence to the place of trial, but reversed Mr. Justice Gray for disallowing the item of necessary expenses amounting to \$212.20. On page 117 of 34 L. Ed. the Court said:

"The judgment is reversed with directions to enter a judgment in favor of the United States for the sum of \$7,334.00, with interest . . . , and for its costs in the Court below, as indicated in this opinion."

In the case of *Stokely vs. Mather*, 270 Fed. 592, where the sole question involved was mileage allowable from actual residence, the Court allowed mileage for 2,500 miles for a witness who traveled from Florida to Boston to testify. Another witness was allowed mileage for 314 miles. This case discusses a number of cases on this question and cites with approval the holding of *United States vs. Sanborn*, supra.

CONCLUSION

It is respectfully submitted that the Municipal Court has jurisdiction to tax mileage costs of witnesses, and that the Court properly discharged the rule issued against the Clerk for the purpose of requiring the costs to be retaxed, and that the Lower Court's action should be affirmed.

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Attorney for Defendant in Error.

